United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7164

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE DUCKETT AND DELORES DUCKETT,

plaintiffs-
appellants,

- against -

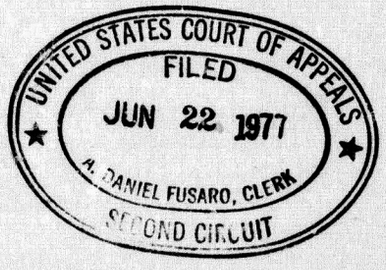
EVE SILBERMAN,

defendant-
appellee.

DOCKET #
77 - 7164

BRIEF FOR DEFENDANT-APPELLEE

EVE SILBERMAN



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STATEMENT OF THE CASE

The facts here are very succint and uncomplicated. First of all plaintiffs have not shown proper agency. See page 134A of record lines 12-14. However, as will be born out by the hearing, there were negotiations for the premises involved by plaintiffs after it was known that they were of the Negro race. As a matter of fact, the price was reduced from $55,000.00 to $45,000.00 after such knowledge. See page 144A of record lines 12 through 25, 145A, 146A through line 24, 266A lines 8-25, 267A, 278A lines 10-25, 279A lines 2-13, 288A lines 22-25, 289A lines 2-23, 290A lines 3-5. A contract was drawn and when the terms were discussed between counsel, it is admitted and undisputed that plaintiffs desired further benefits besides a reduction in price as to guarantee as to condition and certain repairs to this plaintiff via his counsel were told that this would not be met. See record, pages 157A lines 1-25, page 158A lines 1-21, 261A lines 6-17, 266A,lines 8-25, 267A lines 1-25, 268A,lines 1-15. The plaintiff George Duckett in an interesting sequel of questions can give no valid reason for the reduction of price of $10,000.00 after seller's knowing of his being a Negro and maintain his argument of discrimination 268A lines 16-25, 269A 270A, 271A lines 1-19. Also see Mr. Hoffman's sketchy basis for this

unwarranted law suit, pages 291A line 2-25, 292A, 293A line 1-15. Even the alleged discussion with the broker as to one of these terms, namely repair, only took place when the asking price was $49,000.00, which is significant. When the plaintiff finally decided to meet the terms, it was too late because another buyer had been procured at more favorable terms, record pages 168A line 25, 169A lines 2-10, 264A lines 11-15, 290A lines 19-22.

In short, there never was a showing of proper agency, nor a meeting of the minds and there has been no showing of discrimination.

The copy of contract between Silberman and Beer annexed to stipulation of fact reflects in the first instance as in paragraph 2 of rider, did not give any representation and property was sold as is. The continuing transcript of Beer indicates he made no demand for appliance guarantee or condition of house record pages 60A lines 20-25, 64A lines 9-17, of Beer continued deposition. Furthermore, the price of Beer deal was $1,000.00 more with no broker commission. The rest of the language in the contract was just stock clauses inadvertently put in and are really what Mr. Duckett asked for in any event. He wanted guarantees as to appliances and the clause in page 2 of rider does not really give that. The first clause

on page 2 is not a representation as to condition being the same on date of closing with the broker being an arbitrator. This in reality is a standard clause of the elements destroyed the municipality condemning the property wholly or partially which would be covered by insurance anyway or a condemnation award.

L A W

POINT I AUTHORITY OF AGENT

There has not been shown to Court an agency in writing between defendant and Ravelle Brickman, N. Y. General Obligation Law 5-701. Therefore any research cited with regard to agency is moot.

POINT II DISCRIMINATION

It is the plaintiff's burden to first show a prima facie showing if discrimination before any duty is cast upon defendant to come forward with any proof. Defendant's counsel finds it amusing that plaintiff's counsel is thoughtful enough to cite a case, Bush vs. Kaim 297 F. S. 151 (N. D. Ohio 1969) which so clearly illustrates the righteousness of defendant's position. In the case cited a rental properly was shown to plaintiffs also being of Negro race for $150/monthly. After plaintiffs saw premises and indicated interest, again the ad was in the newspaper for $140/monthly and from all the facts there was clearly discrimination in that case. But in the case at bar the facts are entirely different. The following are quotes from Bush vs. Kaim, p.#162 #12, the Court states as follows: "In sustaining his burden for proving that there has been a prohibited discrimination under the Act, the plaintiff must show each of the following elements: 1) that the owner (or responsible party)

placed the property on the open market for sale or rental; 2) that the plaintiff was willing to rent or purchase the property on the terms specified by the owner; 3) the plaintiff communicated this willingness to the owner at a time when the property was available for sale or rent; 4) that the owner refused to rent or sell the property to the plaintiff on the terms which the owner indicated would otherwise be satisfactory; and 5) that there is no apparent reason for the refusal of the defendant to rent the property to the plaintiff other than the plaintiff's race."

On page #162, #13, the Court states as follows:

"The defendant may then come forward and rebut the evidence establishing any of these elements, or he may show that there were reasons other than the plaintiff's race underlying his refusal to rent to the plaintiff. Cypress vs. Newport News General and Non-Sectarian Hospital Assoc., 375 F.2d 648 (4th Cir. 1967), Lewis vs. City of Grand Rapids, Mich., 356 F.2d 276 (6th Cir. 1966) Rolfe vs. County Bd. of Ed. of Lincoln County, Tenn., 391 F.2d 77 (6th Cir. 1968), Brooks vs. School Dist. of the City of Moberly, Mos., 267 F.2d 733 (8th Cir. 1959)."

On page #162, #14, 15, the Court states as follows: "Section 1982 does not prohibit an owner from considering factors other than race in determining whether to sell or rent his property to a Negro, or

to any other person for that matter. An owner can refuse to rent or sell to anyone, Negro or White, for any reason he chooses so long as the motivating reason for this decision is not the individuals race or color."

On page #162, #16, 17, the Court states as follows:

"The statute guarantees to Negroes only the "same right" as is enjoyed by White citizens. It does not purport to grant to Negroes' rights which exceed those of White or other citizens. It provides merely that an owner may refuse to rent to a Negro for any reason he would refuse to rent to a White man. The statute merely prohibits him from refusing the Negro solely because he is a Negro."

On page #162, #18, 19 the court states as follows:

"The act does not prohibit an owner from considering any factors other than race which he feels are relevant in determining whether to rent to one individual or another. Such factors, which an owner might consider, include the credit standing of the applicant, his assets, his financial stability, his reputation in the community, his age, the size of his family, the ages of his children, his past experiences as a lessee or tenant, the length of

timehe plans to occupy the premises, and whether he is or is not a transient."

On page #162, #20, the court states as follows:

"The owner may also consider more subjective factors in determining whether he will rent to one individual or another. Thus, he may consider the applicant's appearance, his demeanor, the owner's estimate of his trustworthiness or truthfulness or other subjective factors. Indeed, businessman utilize such conclusions and opinions in their daily affairs."

On page #163, #22, the Court states as follows:

"An owner may even refuse to rent to an individual simply because he does not like him. No one is required to rent or sell to an individual he doens't like. As in other cases, however, the owner may later be called upon to demonstrate in court that his personal dislike of an individual, rather than the individual's race, was responsible for his decision to refuse him as a tenant."

On page #163, #23, the Court states as follows:

"The owner may consider such factors as those set out above in determining whether to rent or sell to any individual. He is not precluded by Section 1982 or by any other federal statute from considering such factors. Indeed, any factor, other than race, which is relevant to a decision whether to rent or sell to an individual may be considered, and the list of factors

set forth above is not intended to be, and could not constitute, an exclusive list."

In many cases of this nature, and in the present case, some or many of the above factors may be relevant. There will likely be individual differences between the Negro plaintiff and the other applicants for the property. In the present case, for example, there is a difference in the ages of the Maguires and the Bushes. There is a possible difference in their credit and financial standing."

On page #163, #24, the Court states as follows:

"Once the plaintiff has made out a prima facie case of discrimination, the owner must come forward and show that there were other factors responsible for his decision not to rent to the plaintiff. It is not sufficient that differences between the plaintiff and other applicants exist. The owner must also show that he actually considered these other factors and used them, rather than race, as the basis for making his decision."

Also see Fred Vs. Kokinokos 346 F Supp 942 (E. D., N. Y. 1972) also thoughtfully cited by my adversary.

POINT III APPLICABILITY 42 USC 3601 et seq.

That the action based in 42 USC 3601 et seq. The suit should be dismissed since the defendant is specifically exempted from the operation of the statute.

42 USC 3603 (b) (1) provides:

(b) Nothing in section 3604 of this title (other than subsection (c) shall apply to

(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, that in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, that such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to of any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, that after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is

sold or rented (a) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (b) without the publication, posting, or mailing, after notice of any advertisement or written notice in violation of section 3604 (c) of this title: but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title...

That the defendant falls within this exemption stated, in that the said premises is a single-family house and that this is the only single-family house owned by defendant and that the house was sold to a third party without the use in any manner of any real estate broker in that the buyer came to know.

That the purchaser found out the house was for sale from a neighbor and had no knowledge of any broker handling the house for sale, as indicated in the contract of sale.

SUMMARY OF EVIDENCE AND LAW

There is no evidence of discrimination in this record. Therefore, plaintiff has not made out a prima facie case and it was not necessary for plaintiff to rebut an inference which was not established. The finding of the District Court was correct.

I find it very difficult to rationalize the proposition that after knowledge of plaintiff's color and reduction of price thereafter can be equated with discrimination.

What plaintiffs have done here is to attempt to force defendant to sell to them by the pressure of this law suit. This improper use of the courts should not be countenanced. So blinding is their zeal to support a cause, for which I respect, in a proper case, that their attorney Thomas Hoffman took the stand on the trial in violation of rules of professional conduct. Now they have the audacity to ask why I did not commit the same misnomer. See record pages 271A, line 25, 272A lines 1-10.

C O N C L U S I O N

What this case is all about is that plaintiff has the audacity to demand an option over and above all other potential buyers, merely because he is "Negro." This is clearly not the law.

There was no showing of agency.

There was no showing of discrimination.

The plaintiff by his continued lengthy haggling lost the deal and it was his misfortune that a more favorable buyer came along and purchased the house.

RESPECTFULLY SUBMITTED

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C E R T I F I C A T E O F S E R V I C E

G E R A L D M U R R A Y, the attorney for the defendant-appellee, certifies that on the 16th day of June, 1977, I did serve three (3) copies of the foregoing Brief upon the attorney for the plaintiffs-appellants by mailing the same, postage paid, prepaid, first class, as follows:

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Respectfully Submitted,

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